PD-0635-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/28/2019 8:50 PM
Accepted 10/31/2019 9:46 AM
DEANA WILLIAMSON
CLERK

NO. PD-0635-19

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
10/31/2019
DEANA WILLIAMSON, CLERK

JAMES RAY HAGGARD

VS.

THE STATE OF TEXAS

ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS FOR THE
NINTH JUDICIAL DISTRICT OF TEXAS
AT BEAUMONT
CAUSE NOS. 09-17-00319-CR & 09-17-00320-CR

Appealed from the
75th District Court of Liberty County, Texas
Cause Number CR30744

APPELLANT'S MERITS BRIEF ON DISCRETIONARY REVIEW

Josh Schaffer
State Bar No. 24037439

1021 Main St., Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
JAMES RAY HAGGARD

ORAL ARGUMENT GRANTED

IDENTITY OF THE PARTIES

Appellant:	James Ray Haggard No. 02155678 Beto Unit 1391 FM 3328 Palestine, TX 75880
Trial Counsel:	Keaton Kirkwood 408 Main Liberty, Texas 77575
Appellate Counsel:	Celeste Blackburn 333 N. Rivershire Dr., Ste. 285 Conroe, Texas 77304
PDR Counsel:	Josh Schaffer 1021 Main St., Suite 1440 Houston, Texas 77002
Appellee:	The State of Texas
Trial Prosecutors:	Joe Warren & Tami Pierce 1923 Sam Houston Liberty, Texas 77575
Appellate Prosecutor:	Stephen C. Taylor 1923 Sam Houston Liberty, Texas 77575
Trial Judge:	Hon. Mark Morefield 1923 Sam Houston Liberty, Texas 77575

SUBJECT INDEX

Page

INDEX OF AUTHORITIES

Cases **Page**

Page

Constitutional Provision

STATEMENT OF THE CASE

A jury convicted appellant of sexual assault of a child under 17 years of age and indecency in cause number CR30744 in the 75th District Court of Liberty County, Texas, before the Honorable Mark Morefield on August 16, 2017. The trial court assessed consecutive prison sentences of 25 years for sexual assault and 25 years for indecency. Keaton Kirkwood represented him at trial.

The Beaumont Court of Appeals affirmed appellant's convictions in an unpublished opinion issued on May 29, 2019. Haggard v. State, Nos. 09-17-00319-CR & 09-17-00320-CR, 2019 WL 2273869 (Tex. App.—Beaumont 2019, pet. granted). Celeste Blackburn represented him in the court of appeals.

ISSUE PRESENTED

> Whether permitting a key prosecution witness to testify remotely by videoconference from Montana violated the Confrontation Clause of the Sixth Amendment and was not harmless beyond a reasonable doubt.

STATEMENT OF FACTS

A grand jury indicted appellant on February 19, 2014, with one count of sexual assault of a child under age 17, in violation of Texas Penal Code § 22.011, and one count of indecency with a child under age 17, in violation of § 21.11 (1 C.R. 2). The indictment alleged that appellant committed both offenses against M.W., age 15, on October 5, 2013. It also alleged that appellant had two prior felony convictions for forgery in 1992 (1 C.R. 3).

The State's case depended on two witnesses. The complainant testified that appellant engaged in oral and vaginal sex with her and placed his mouth on her breasts (5 R.R. 31-102); and an expert from the state crime laboratory testified that DNA found on the complainant's breast matched appellant's DNA (4 R.R. 181-226).

The prosecutor emphasized during his opening statement and summation that the DNA expert concluded that appellant's DNA was found on the complainant's breast (4 R.R. 26-27; 5 R.R. 138-39). This evidence was "the strongest and most definitive piece of evidence we have got in this case" (5 R.R. 139). The prosecutor emphasized the DNA evidence because the complainant's testimony was weak. Significantly, she told a forensic examiner that appellant ejaculated "everywhere," including on her face and hands—and that she wiped his semen on her shirt—yet another expert from the crime lab testified that appellant's semen was not discovered on that shirt or any other clothing worn by the complainant during the alleged incident (5 R.R. 96, 101-02; 4 R.R. 156-68).

Over repeated Confrontation Clause objections, the trial court allowed Sexual Assault Nurse Examiner (SANE) Suzanne Devore to testify at trial remotely by videoconference (FaceTime) from Montana, where she then resided (3 R.R. 158-68; 4 R.R. 52-56). Devore did not testify in person because she decided that it was inconvenient for her to travel to Texas for the trial, and the prosecutor failed to issue a subpoena to her before the trial (4 R.R. 84, 91-94). Devore testified about what

the complainant reported to her, her findings from the SANE examination, and the chain of custody regarding evidence that she obtained from the complainant, including the DNA swabbed from the complainant's breast (4 R.R. 56-84).

The State's primary DNA expert, Andrea Smith, analyzed the DNA swabs that Devore collected from the complainant and compared them to appellant's DNA sample. Smith did not independently collect DNA evidence from the complainant (4 R.R. 62-65, 69, 78-84, 193-95). Rather, Devore collected this evidence as part of the "chain of custody"—"to send [the DNA evidence] . . . to the crime lab to potentially identify DNA from the perpetrator" (4 R.R. 80).[1] As the SANE, her "job [was] strictly to collect the evidence, not to examine it" (4 R.R. 91). At trial, Smith opined that there was an extremely high probability that appellant's DNA was on the complainant's right breast by comparing the swab of the complainant's right breast (collected by Devore) with a sample of appellant's DNA (4 R.R. 206-15).[2]

Devore's testimony was essential to prove the chain of custody concerning the critical DNA evidence. But she not only provided the first link in the State's

[1] Before trial, the prosecutor acknowledged that Devore had "collected the SANE kit and submitted the SANE kit to the sheriff's department to put in the chain of custody to send it to the DPS lab along with everything else" (3 R.R. 165). The trial court stated, "Of course, you will have your same burden of chain of custody through this witness as any other witness" (3 R.R. 166). The prosecutor then responded that Devore "is the only one that could actually do this one" (3 R.R. 166).

[2] Smith opined that it was "219 quadrillion times more likely" that the DNA on the complainant's breast came from appellant than any other unknown person (4 R.R. 214).

chain of custody; she also testified about the complainant's detailed, prior consistent statement concerning the alleged incident made during the SANE examination (4 R.R. 66-68). Although the complainant's mother and aunt also suggested that the complainant made prior consistent statements (4 R.R. 235-38; 5 R.R. 10-18), those witnesses were biased in favor of the complainant because they are related to her. By contrast, Devore claimed to be "total[ly] disinterested" (4 R.R. 80)—the only supposedly neutral witness who testified about the complainant's prior consistent statements. Thus, Devore was an important fact witness regarding the complainant's credibility in addition to an essential chain-of-custody witness concerning the critical DNA evidence.

The jury convicted appellant on both counts, and the trial court sentenced him to consecutive 25-year sentences (5 R.R. 153; 6 R.R. 52).

SUMMARY OF THE ARGUMENT

The State inexplicably failed to subpoena Suzanne Devore, the SANE who examined the complainant and collected critical DNA evidence. The prosecutor admitted that Devore was an essential witness (3 R.R. 166). Instead of securing her attendance at trial, the State compensated for its omission by using FaceTime technology to videoconference her face onto a television screen in the courtroom from her home in Montana (3 R. 158). This arrangement violated appellant's Sixth Amendment right to confront this important witness face-to-face in court. A trio of

Supreme Court decisions—Coy v. Iowa, 487 U.S. 1012 (1988); Maryland v. Craig, 497 U.S. 836 (1990); and Crawford v. Washington, 541 U.S. 36, 61-62 (2004)—clearly establish that the trial court's remedy for Devore's failure to appear in person violated the Confrontation Clause. The State did not establish any "necessity" for Devore to appear remotely by videoconference. Her physical absence from the courtroom during her testimony prevented appellant from cross-examining her in compliance with the requirements of the Confrontation Clause. The jury, judge, lawyers, and appellant could not see her entire body on the television screen. More importantly, she could not see appellant.

This violation of the Confrontation Clause was not harmless beyond a reasonable doubt. The Supreme Court holds that "[a]n assessment of harmlessness [of this type of Confrontation Clause violation] cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." Coy, 487 U.S. at 1021-22. Without Devore's testimony, the State could not establish a proper chain of custody for the DNA evidence analyzed by the crime lab expert. Without the DNA evidence, the complainant's testimony would have been extremely weak based on her incredible claim that appellant ejaculated "everywhere" and she wiped his semen on her shirt—

which DNA tests demonstrated was false.

Appellant is entitled to a new trial because the constitutional error was not harmless beyond a reasonable doubt.

ISSUE

PERMITTING A KEY PROSECUTION WITNESS TO TESTIFY REMOTELY BY VIDEOCONFERENCE FROM MONTANA VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT AND WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

A. Statement Of Facts

A few days before appellant's trial was scheduled to commence, Suzanne Devore, the SANE who examined the complainant and collected critical DNA evidence, informed the prosecutor that she would not travel from her home in Montana to testify in Texas (3 R.R. 163-64; 4 R.R. 84, 92-93).[3] On August 14, 2017, one day before the trial was to begin, the prosecutor revealed to appellant that Devore would not appear in court (3 R. 158). The prosecutor had failed to subpoena her using an available procedure to secure the presence of an out-of-state witness.[4] Instead, the prosecutor merely intended to pay Devore's travel expenses and ***hoped*** that she would appear voluntarily (3 R.R. 163-64; 4 R.R. 84, 92-93).

[3] Devore moved to Montana after she examined the complainant in Texas in 2013 (4 R.R. 54-55).

[4] The trial court told the prosecutor that "there is a procedure available to secure the presence of out of state witnesses" (3 R.R. 163). The State did not request a brief continuance to seek Devore's presence through that established procedure.

Devore unilaterally and voluntarily decided not to travel to Texas because it would be inconvenient (4 R.R. 84, 91-94). In response, the prosecutor hastily arranged to have her testify remotely by videoconference from Montana using FaceTime technology (3 R.R. 158-59).[5] After discovering the prosecutor's plan, defense counsel repeatedly objected to Devore's testimony as a violation of the Due Process and Confrontation Clauses (3 R.R. 158-68; 4 R.R. 52-56). The trial court overruled the objections because Devore was an "expert" witness rather than a "fact" witness and because her testimony was "reliable" (3 R.R. 159, 162-64; 4 R.R. 55). The trial court found that, using FaceTime technology, the defense and the jury could see Devore during her testimony on a "60 to 65-inch TV" (3 R.R. 165).

Devore testified about what the complainant reported to her, her findings from the SANE examination, and the chain of custody regarding the DNA evidence that she obtained (4 R.R. 56-84). The videoconference technology failed during her testimony, requiring re-connection of the signal (4 R.R. 66-67).

The prosecutor argued during summation that the evidence of appellant's DNA on the complainant's breast was "the strongest and most definitive piece of evidence we have got in this case" (5 R.R. 139). The prosecutor acknowledged that the DNA evidence was not admissible without first proving the chain of custody

[5] The trial court noted that the videoconference technology used at trial was "FaceTime" (3 R.R. 158). FaceTime technology is described at https://support.apple.com/en-us/HT204380 (last visited October 28, 2019).

from its collection by Devore in 2013 to its analysis by crime lab analyst Andrea Smith several years later (3 R.R. 166). The prosecutor admitted that Devore was an essential State's witness because she was a necessary link in the DNA chain of custody (3 R.R. 166).

B. Argument And Authorities

1. Relevant Supreme Court Precedent—Coy, Craig, and Crawford

The trial court violated well-established Supreme Court Confrontation Clause precedent because the State did not establish sufficient cause to justify Devore's physical absence from the courtroom and her virtual appearance by FaceTime did not give appellant a meaningful opportunity to cross-examine her face-to-face. See Coy v. Iowa, 487 U.S. 1012 (1988); see also Maryland v. Craig, 497 U.S. 836 (1990); cf. Crawford v. Washington, 541 U.S. 36, 61-62 (2004).

In an opinion written by Justice Scalia, the Supreme Court held in Coy that placing a screen between two testifying juvenile complainants and the defendant at his sexual abuse trial violated the Confrontation Clause. The Confrontation Clause guarantees a "face-to-face encounter" between the defendant and his accusers. Coy, 487 U.S. at 1017. The Court explained the rationale for this constitutional requirement: "The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm

greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is." Id. at 1019 (citations and internal quotation marks omitted). "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions [if that occurs]. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that [the Court] ha[s] had more frequent occasion to discuss—the right to cross-examine the accuser; both ensur[e] the integrity of the fact-finding process." Id. at 1019-20 (citations and internal quotation marks omitted). The Court noted "the irreducible literal meaning of the Clause: a right to ***meet face to face*** all those who appear and give evidence ***at trial***." Id. at 1021 (emphasis in original; citations and internal quotation marks omitted).

Justice O'Connor, concurring with the majority in Coy, would "permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy . . . [such as] protection of child witnesses . . . if a [trial] court makes a case-specific finding of necessity [for the well-being of the child]." Id. at 1025 (O'Connor, J., concurring).

Thereafter, the Court held in Craig that the State's use of a one-way, closed-circuit television to allow a child witness to testify in a sexual assault case, pursuant

to a state statute allowing for such remote testimony, did not violate the Confrontation Clause. The technology allowed the defendant and jury to see the child but not vice-versa. Craig, 497 U.S. at 842. Unlike in Coy, the trial court had "made individualized findings that each of the child witnesses needed special protection," justifying the remote testimony. Id. at 845; see also id. at 860 ("So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way, closed-circuit television procedure for the receipt of testimony by a child witness in a child abuse case."). Announcing a "necessity" procedure to promote an "important public policy," the Court concluded that the remote-testimony procedure used in Craig did not violate the Confrontation Clause. Id. at 850-57. Justice Scalia dissented.[6]

The Craig Court did not undermine the general rule from Coy regarding face-to-face testimony. Indeed, the Court emphasized the importance of the face-to-face requirement of the Confrontation Clause—subject to the narrow "necessity" exception announced in Craig. "The combined effect of these elements of confrontation—***physical presence***, oath, cross-examination, and ***observation of demeanor by the trier of fact***—serves the purposes of the Confrontation Clause by

[6] After Craig, Justices Scalia and Thomas repeatedly criticized Craig for conflicting with the Framers' intent. See, e.g., Marx v. Texas, 528 U.S. 1034 (1999) (Thomas & Scalia, JJ., dissenting from denial of cert.). Adopting their rationale, appellant contends that Crawford, decided *after* Craig, effectively overruled Craig. Therefore, this Court need not engage in a Craig "necessity" analysis. But, as discussed below, even if this Court did so, there was no "necessity" for Devore to testify remotely.

ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings." Craig, 497 U.S. at 846. Thus, the Confrontation Clause ordinarily requires a witness's physical presence in the courtroom so the trier of fact can observe the witness's demeanor when she must face the defendant.

More than a decade after Coy and Craig, the Supreme Court revisited the Confrontation Clause in a different context in Crawford, when it reviewed the use of out-of-court "testimonial hearsay" during a criminal trial. Although Crawford did not specifically address trial procedures such as those used in Coy and Craig, Justice Scalia, writing for the Court, reiterated the critical importance of the Confrontation Clause in a criminal trial. Crawford, 541 U.S at 42 (referring to right to confrontation as "bedrock procedural guarantee") (citation and internal quotation marks omitted); see also Coronado v. State, 351 S.W.3d 315, 322 (Tex. Crim. App. 2011) ("Fourteen years after Craig, in Crawford v. Washington, the Supreme Court reiterated the categorical right of confrontation that it had set out in Coy."). Moreover, the Court rejected any argument that the State can satisfy the Confrontation Clause by alternative procedures that produce "reliable" evidence. 541 U.S at 61 ("[W]e do not think the Framers meant to leave the Sixth Amendment's [Confrontation Clause] protection . . . to amorphous notions of 'reliability.'"); see also id. at 62 ("Dispensing with confrontation because testimony

is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

In sum, the relevant Supreme Court precedent clearly establishes that a defendant has a constitutional right to confront and cross-examine prosecution witnesses face-to-face in the courtroom. The exception to this general rule permits a child abuse complainant to testify remotely when the trial court makes a finding of "necessity."

2. Devore's Remote Testimony by Videoconference Did Not Satisfy the Requirements of the Confrontation Clause.

The trial court's decision to permit Devore to testify remotely by videoconference conflicted with Coy, Craig, and Crawford. This procedure violated the Confrontation Clause in two specific ways. First, Devore's physical absence from the courtroom reduced the pressure to tell the truth that she otherwise would have felt on the witness stand and prevented the jury from seeing her entire body. Second, she did not have to observe appellant while testifying.[7]

[7] Contrast Horn v. Quarterman, 508 F.3d 306 (5th Cir.), cert. denied, 553 U.S. 1020 (2008). This Court initially found no violation of the Confrontation Clause, and the Fifth Circuit held that this decision was not an "unreasonable" application of Coy and Craig under the doubly deferential federal habeas corpus standard of review. The prosecution witness from Ohio was terminally ill and hospitalized, so the trial court found a "necessity" for his remote testimony. The trial court required the prosecutor and defense counsel to travel to Ohio to be with the witness when he testified from his hospital bed by two-way videoconference. Both the witness in Ohio and the courtroom in Texas used four-by-six-foot television screens. Additionally, the videoconference technology enabled the jury and defendant to see the witness "in full view" (not just his face) and the witness to see the defendant, judge, and jury while testifying. 508 F.3d at 313, 317-18.

a. Devore's Physical Absence From The Courtroom

Devore's physical absence from the courtroom violated the Confrontation Clause. The nature of this violation differed from Delaware v. Van Arsdall, 475 U.S. 673 (1986), where the violation resulted from a limitation on the defendant's ability to cross-examine a witness about bias, and Crawford v. Washington, supra, where the violation resulted from the admission of out-of-court testimonial hearsay.

Remote videoconference testimony of a prosecution witness physically absent from the courtroom is qualitatively different from testimony by a witness who physically appears in the solemn atmosphere of a courtroom. The United States Court of Appeals for the Eighth Circuit instructively elaborated on this point in United States v. Bordeaux, 400 F.3d 548, 554 (8th Cir. 2005):

> "The virtual 'confrontations' offered by [two-way] closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect. The Constitution favors face-to-face confrontations to reduce the likelihood that a witness will lie. . . . 'Confrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed-circuit television to justify different treatment under Craig. It is true that a two-way closed-circuit television creates an encounter that more closely approximates a face-to-face confrontation than a one-way closed-circuit television does because a witness can view the defendant with a two-way system. But two-way systems share with one-way systems a trait that by itself justifies the application of Craig: the 'confrontations' they create are virtual, and not real in the sense that a face-to-face confrontation is real."

See also United States v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006) (en banc) ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. As our sister circuits have recognized, the two are not constitutionally equivalent.") (citing cases).

Because the videoconference technology did not reveal Devore's entire body while testifying, the jury could not see if she was wringing her hands, bouncing her legs, or engaging in other body language that indicates deception.[8] In judicial proceedings and in everyday life, immediate physical presence is crucial to assess a person's demeanor and credibility. This Court has recognized that even relatively minor impairments on a jury's ability to assess a prosecution witness's demeanor violate the Confrontation Clause. See Romero v. State, 173 S.W.3d 502, 503 (Tex. Crim. App. 2005) (Confrontation Clause violation when prosecution witness testified in courtroom wearing dark sunglasses, baseball cap pulled down over forehead, and long-sleeved jacket with collar turned up and fastened to obscure mouth, jaw, and lower half of nose).

[8] Notably, the trial court did *not* find—and the record does not support a finding—that the FaceTime videoconference technology allowed Devore to see appellant while testifying (as opposed to seeing defense counsel while he questioned her), nor did it find that the jury could see Devore's full body (as opposed to only her face) (3 R.R. 158, 165). See also Haggard, 2019 WL 2273869 at *4 ("The trial court confirmed that the SANE would be displayed 'at least on the 60 or 65-inch TV that the jury can view[,]' defense counsel and the defendant could see the testimony, the jury would have view of the SANE's face at all times during her testimony, the SANE could see the person asking questions, and that the SANE would be given instructions to 'stay[ ] in front of the camera system . . . which is whatever her device is[.]").

Furthermore, testifying remotely subjected Devore to less pressure on cross-examination than had she testified in person. She was physically and emotionally far removed from the courtroom—more than 1,500 miles, according to Google Maps. The Confrontation Clause, as a key element of the adversarial system of criminal justice, envisions such pressure as a means of assuring truthfulness by prosecution witnesses in criminal cases. Because the jury could not see Devore's entire body, her remote testimony violated the Confrontation Clause.

b. Devore Did Not See Appellant When She Testified.

The Supreme Court observes that a key purpose of the Confrontation Clause is to test a prosecution witness's credibility by forcing the witness to have an unobstructed view of the defendant. See Coy, 487 U.S. at 1019 ("A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is. . . . The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.") (quotation marks and citation omitted). Because Devore could not see appellant, her remote testimony violated the Confrontation Clause.

3. The Trial Court Erred In Finding That The Confrontation Clause Did Not Apply To Devore Because She Was An "Expert" Witness.

The trial court erred in excusing Devore's physical presence because she was

an "expert" rather than a "fact" witness. The Confrontation Clause applies equally to expert and lay witnesses. See, e.g., Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (Confrontation Clause equally applies to lay and expert witnesses); see also State v. Almanza, 160 P.3d 932, 935 (N.M. 2007) ("Where there are requirements of important public policy and showing of necessity, mere inconvenience to the [expert] witness [a chemist] is not sufficient to dispense with face-to-face confrontation. Accordingly, it was error for the trial judge to proceed with the telephonic testimony of the chemist in this case.").

Even if the Confrontation Clause does not apply to expert witnesses, Devore was *both* an expert and a fact witness because she testified about the complainant's prior consistent statements, which the prosecutor emphasized to the jury (4 R.R. 23).

4. No Case-specific "Necessity" Justified Devore's Remote Testimony.

The Supreme Court held in Craig that, "So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case." 497 U.S. at 860. But Devore was neither a child nor the complainant, such as the witnesses in Craig. See, e.g., People v. Murphy, 132 Cal.Rptr.2d 688, 693 (Cal. App. 2003) (refusing to apply Craig to adult witness). Nor did Devore suffer from an injury, illness, or ailment that prevented her from traveling to Texas. Rather, her absence resulted solely from her unilateral,

voluntary decision not to travel here because of the personal inconvenience. Thus, no compelling public policy required that she testify remotely instead of in person. Her absence simply was not a "necessity," and the trial court made no such finding.

In failing to subpoena Devore, the State bears complete responsibility for her absence. Devore was not located in a foreign country beyond the State's subpoena power. As the trial court recognized (3 R.R. 163), the State could have used established procedures to subpoena her as an out-of-state witness. Unlike in Craig, there was no "important public policy" served by having her testify remotely. See State v. Rogerson, 855 N.W.2d 495, 496 (Iowa 2014) ("Applying Sixth Amendment precedent, we now hold that two-way videoconference testimony should not be substituted for in-person confrontation absent a showing of necessity to further an important public interest. Because the grounds advanced by the State do not reach that level, we hold the district court erred in allowing the videoconference testimony."). There was no "necessity" for Devore to testify remotely, just as there is no "manifest necessity" to declare a mistrial when the prosecutor unjustifiably fails to subpoena a witness. Cf. Downum v. United States, 372 U.S. 734 (1963) (no "manifest necessity" under Double Jeopardy Clause for mistrial when prosecutor failed to subpoena witness who refused to appear voluntarily). The State is entirely responsible for the constitutional error in appellant's case.

5. The Court of Appeals Assumed That Any Confrontation Clause Violation Was Harmless Beyond A Reasonable Doubt.

The court of appeals assumed without deciding that constitutional error occurred and concluded that any error was harmless:

> Even assuming without deciding that the trial court abused its discretion in allowing the SANE's testimony, the violation of the Sixth Amendment right of confrontation constitutes constitutional error that is subject to a harmless error analysis. Shelby v. State, 819 S.W.2d 544, 546 (Tex. Crim. App. 1991) (citing Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)).
>
> When assessing harm under a Confrontation Clause issue, we apply a three-pronged test. Id. at 547. First, we assume that the damaging potential of the cross-examination was fully realized. Id. Second, with that assumption in mind, we review the error by considering the following factors: the importance of the witness's testimony in the State's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting material points of the witness's testimony, the extent cross-examination was otherwise permitted, and the overall strength of the State's case. Id. Third, we determine whether the error was harmless beyond a reasonable doubt. Id.
>
> The SANE was an expert witness who testified about what [the complainant] reported to her, the findings from her examination of [the complainant], and the chain of custody regarding evidence the SANE obtained. After reviewing the entire record, we conclude that much of the SANE's testimony was cumulative of [the complainant's] testimony, and the SANE was not a crucial identification or fact witness. The record demonstrates that the trial court permitted Haggard to fully cross-examine the SANE. There was evidence introduced from [the complainant, her mother, and her aunt] as well as from the

> forensic witnesses that corroborated the material points of the SANE's testimony, and the State's case was not dependent upon the SANE's testimony.
>
> [The complainant's] testimony alone is sufficient to support Haggard's convictions. . . . Because our review of the record shows that the properly admitted evidence overwhelmingly established Haggard's guilt, we conclude, beyond a reasonable doubt, that the admission of the SANE's testimony via live videoconferencing did not contribute to Haggard's convictions. We overrule issue one.

Haggard, 2019 WL 2273869 at *7.

6. The Confrontation Clause Violation Was Not Harmless Beyond A Reasonable Doubt.

The court of appeals' harm analysis was flawed in several respects.

Once a defendant establishes on direct appeal that a constitutional error occurred at trial, the burden shifts to the State to prove beyond a reasonable doubt that the error did not "contribute to the verdict." Chapman v. California, 386 U.S. 18, 24 (1967). Chapman "instructs the reviewing court to consider not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. . . . Harmless-error review looks . . . to the basis on which the jury actually rested its verdict. . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v.

Louisiana, 508 U.S. 275, 279 (1993) (citation and quotation marks omitted). Nor does it matter that, excluding the evidence tainted by the constitutional error, the remaining evidence was sufficient to sustain the conviction. See Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963) (in assessing whether constitutional error was harmless, "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.").[9]

Most important, the Supreme Court announced a special rule for harm analysis for a "face-to-face" Confrontation Clause violation. Coy, 487 U.S. at 1021-22 ("An assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence."). In other words, when conducting a harm analysis under Coy, a reviewing court "must disregard . . . [the] testimony of [the witness who was not physically present in the courtroom] entirely." Bowser v. State, 205 P.3d 1018, 1024

[9] Although Fahy was decided four years before Chapman, this Court has recognized Fahy's continuing precedential value following Chapman. See Harris v. State, 790 S.W.2d 568, 585 (Tex. Crim. App. 1989), overruled on other grounds, Snowden v. State, 353 S.W.3d 815 (Tex. Crim. App. 2011).

(Wyo. 2009); see also United States v. Turning Bear, 357 F.3d 730, 741 (8th Cir. 2004) ("In analyzing the evidence for harmless error, M.T.B's closed-circuit television testimony 'must be entirely excluded because it would be "pure speculation" to consider whether the child's testimony, or the jury's assessment of that testimony, would have changed had there been proper confrontation.'").

The court of appeals failed to recognize that Devore's testimony clearly "contributed to the verdict" under Chapman because, without her testimony, the DNA evidence that she collected as the origin of the chain of custody was inadmissible.[10] Devore was an essential witness because she was "the beginning . . . of the chain of custody." Martinez, 186 S.W.3d at 62. The prosecutor acknowledged that she was a critical chain-of-custody witness before the trial began (3 R.R. 166) (emphasis added):

> THE COURT: Of course, you will have your same burden of chain of custody through this witness [Devore] as any other witness.
>
> MR. WARREN: ***She [Devore] is the only one that could actually do this one.***

[10] See Martinez v. State, 186 S.W.3d 59, 62 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) ("The authentication requirement for admissibility is met once the State has shown the beginning and the end of the chain of custody, particularly when the chain ends at a laboratory."); accord Durrett v. State, 36 S.W.3d 205, 208 (Tex. App.—Houston [14th Dist.] 2001, no pet.); see also Stoker v. State, 788 S.W.2d 1, 10 (Tex. Crim. App.1989) (witness who tags item of physical evidence at time of seizure and then identifies it at trial based on that tag is sufficient for admission under chain-of-custody rule), disapproved of on other grounds, Leday v. State, 983 S.W.2d 713 (Tex. Crim. App. 1998).

The court of appeals ignored the significance of Devore's testimony as an essential predicate for the admission of Andrea Smith's expert testimony about appellant's DNA allegedly found on the complainant's breast.

In assessing harm for this type of Confrontation Clause violation under Coy, a reviewing court must *completely exclude* consideration of the testimony of the affected witness. Coy, 487 U.S. at 1021-22; Turning Bear, 357 F.3d at 741; Bowser, 205 P.3d at 1024. As for Devore's testimony, this Court cannot say—and certainly not beyond a reasonable doubt—that the "verdict actually rendered in this trial was surely unattributable to" her testimony. Sullivan, 508 U.S. at 279. Of course, the jury's verdict was attributable—in the "but for" sense—to Devore's testimony. Without it, the DNA evidence would have been inadmissible, and the State's case would have pivoted exclusively on the complainant's testimony. As discussed above, the complainant's testimony was undermined by her incredible claim that appellant ejaculated "everywhere," including on her shirt. Yet, appellant's DNA was not found on that shirt. The State's case thus turned on Smith's expert testimony that appellant's DNA was found on the complainant's breast, and that testimony would not have been admissible without Devore's chain-of-custody testimony.

The court of appeals erred in other ways. It applied the harm analysis from Delaware v. Van Arsdall instead of the harm analysis from Coy.[11] Van Arsdall harm

[11] The court of appeals cited this Court's decision in Shelby v. State, 819 S.W.2d 544, 546

analysis applies to a distinct type of Confrontation violation—a trial court's erroneous refusal to allow cross-examination on the bias of a physically present prosecution witness. See Wasko v. Singletary, 966 F.2d 1377, 1382-83 (11th Cir. 1992) (discussing difference between Coy harm analysis for "face-to-face" Confrontation Clause violation and Van Arsdall harm analysis for other Confrontation Clause violations). Coy, not Van Arsdall, provides the proper harm analysis for a "face-to-face" Confrontation Clause violation. Had the court of appeals properly applied Coy, it would have completely disregarded Devore's testimony. See Bowser, 205 P.3d at 1024.

Finally, the court of appeals' decision that any error was harmless because the remaining evidence was legally sufficient to support appellant's convictions directly conflicts with Fahy, 375 U.S. at 86-87. See also Passman v. Blackburn, 797 F.2d 1335, 1347 (5th Cir.1986) (citing Fahy), cert. denied, 480 U.S. 948 (1987), overruled on other grounds as recognized in Saahir v. Collins, 956 F.2d 115, 119 (5th Cir. 1992). Assuming *arguendo* that consideration of the amount of remaining evidence is proper in a Chapman harm analysis, the proper question is whether the remaining evidence was "overwhelming." See Snowden, 353 S.W.3d at 818-19 & n.14. There

(Tex. Crim. App. 1991), which in turn relied on Van Arsdall. Shelby involved a limitation on the defendant's cross-examination of an in-court prosecution witness and did not involve a face-to-face violation of the Confrontation Clause. Shelby, 819 S.W.2d at 545. Shelby, like Van Arsdall, is inapposite to a Coy, face-to-face Confrontation Clause violation.

is a vast difference between "overwhelming" evidence and constitutionally-sufficient evidence. See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) ("[The sufficiency-of-the-evidence] inquiry does not require a court to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt. . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") (international quotation marks and citation omitted; emphasis in original).

After excluding consideration of Devore's testimony, which in turn would exclude Smith's expert testimony and the DNA evidence implicating appellant, the remaining evidence at trial focused solely on the complainant's testimony. Her credibility was weakened by her claim that appellant ejaculated "everywhere" and that she wiped his semen on her shirt, as the shirt did not have appellant's DNA on it. Furthermore, separate from Devore's essential chain-of-custody testimony, the prosecutor asserted that she was the only "disinterested" prosecution witness who provided important testimony about the complainant's prior consistent statements (4 R.R. 80). Thus, in addition to excluding Devore's chain-of-custody testimony, the harm analysis also must exclude the only "disinterested" testimony of the complainant's prior consistent statements. The combined effect of Devore's "expert" and fact testimony demonstrates the harm that appellant suffered from the

Confrontation Clause violation.

In conclusion, the Confrontation Clause violation was not harmless beyond a reasonable doubt under Chapman, Coy, and Fahy.

CONCLUSION

The Court should reverse the judgment of conviction and remand for a new trial.

Respectfully submitted,

/S/ Josh Schaffer
Josh Schaffer
State Bar No. 24037439

1021 Main St., Suite 1440
Houston, Texas 77002
(713) 951-9555
(713) 951-9854 (facsimile)
josh@joshschafferlaw.com

Attorney for Appellant
JAMES RAY HAGGARD

CERTIFICATE OF SERVICE

I served a copy of this document on Stephen C. Taylor, assistant district attorney for Liberty County, and on Stacey M. Soule, State Prosecuting Attorney, by electronic service on October 28, 2019.

/S/ *Josh Schaffer*
Josh Schaffer

CERTIFICATE OF COMPLIANCE

The word count of the countable portions of this computer-generated document specified by Rule of Appellate Procedure 9.4(i), as shown by the representation provided by the word-processing program that was used to create the document, is 6,042 words. This document complies with the typeface requirements of Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

/S/ *Josh Schaffer*
Josh Schaffer